Journal of the National Association of Administrative Law Judiciary

Volume 10 | Issue 1 Article 4

3-15-1990

Unemployment Insurance and the Religion Clauses of the United States Constitution

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UNEMPLOYMENT INSURANCE AND THE RELIGION CLAUSES OF THE UNITED STATES CONSTITUTION

David Joseph Agatstein [1/]

I

In 1784 the General Assembly of Virginia was asked to impose an excise tax, known as a tithe, for the support of the clergy. In its final form, the Assessment Bill provided that each taxpayer could designate the "society of Christians" to receive his share of the tax or, if he did not so designate, the taxpayer's share would be paid into the "public Treasury" to be used "for the encouragement of seminaries of learning." [2/]

It appears that the Assessment Bill enjoyed considerable popularity. [3/] It was, however, defeated, following resolute opposition by a member of the Assembly, James Madison, who explained his

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2/ Appendix to dissenting opinion of Rutledge, J., in Everson v. Board of Education, 330 U.S. 1, 72-74 (1947) (hereinafter "Everson").

3/ Everson, 330 U.S. 37.

views on the proper relationship between government and religion in his famous Remonstrances, [4/] and later, more succinctly as follows: [5/]

> The tendency to a usurpation on one side or the other, or to a corrupting coalition or alliance between them, will best be guarded agst. by an entire abstinence of the Govt. from interference in any way whatever, beyond the necessity of preserving public order, & protecting each sect agst. trespasses on its legal rights by others . . . .

Some years later, Madison represented Virginia in the First Congress. There, with the assistance of his fellow Virginian, Thomas Jefferson, he proposed and secured ratification of the First Amendment as the first article of the American Bill of Rights. As Jefferson later wrote: [6/]

> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of Government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and State.

Of course, notwithstanding the vividness of Jefferson's metaphor, there never has been a "wall" of total separation. Madison himself, in the previously quoted letter, foretold that the wall would be breached in the interests of "public order." Moreover, the issues arising under the Religion Clauses have proven far more complex and intractable than police and fire protection for religious organizations, or disputed title to church property. Transportation and other aid to parochial school children; public school prayers, released time and moments of silence; Sabbath laws and public displays

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4/ Memorial and Remonstrance against Religious Assessments; appendix to dissenting opinion of Rutledge, J., in Everson, 330 U.S. 71-72.

5/ Everson, 330 U.S. 40 fn. 28, citing IX Madison 484, 487.

6/ Illinois ex rel. McCollum v. Board of Education, (1948) 333 U.S. 203, 244 fn. 8 (Reed, J., dissenting), citing 8 The Writings of Thomas Jefferson (Washington Ed., 1861) 113.

of religious symbols; taxation of ecclesiastical property and tax exemption of religious contributions; taxation or exemption of church income; the regulation of practices having religious significance; and numerous other issues have concerned, and often divided the Supreme Court, producing results which are difficult, if not impossible, to reconcile. As Chief Justice Burger, speaking for the court, acknowledged, "we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." 7/

Nevertheless, while the problem of demarcation remains acute, certain principles relevant to the topic under discussion may be stated with reasonable certainty. Thus, said the Supreme Court, in School District of Abington Township v. Schempp, 8/ it is "decisively settled that the First Amendment's mandate that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof' has been made wholly applicable to the States by the Fourteenth Amendment." Moreover, in Everson v. Board of Education, 9/ the court declared:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.

The Everson court's reference to "all religions" deserves some emphasis. Justice Rutledge, dissenting in the same case, stated that the prohibited "consequence and effect are not removed by multiplying to all-inclusiveness the sects for which support is

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7/ Lemon v. Kurtzman, 403 U.S. 602, 612 (1970).

8/ 374 U.S. 203, 215 (1963).

9/ 330 U.S. 15-16.

exacted." [10] Moreover, in Schempp, supra, the Supreme Court "rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another." [11]

Walz v. Tax Commission [12] declared that the Establishment Clause was intended to afford protection against the evils of "sponsorship, financial support, and active involvement of the sovereign in religious activity." To guard against these evils the Supreme Court, in Lemon v. Kurtzman, [13] fashioned a three-pronged test:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster "an excessive governmental entanglement with religion."

The "entanglement" prong has been the most difficult for courts to apply. The reason for the rule may be simply stated: [14]

> When the state becomes enmeshed with a given denomination in matters of religious significance, the freedom of religious belief of those who are not adherents of that denomination suffers, even when the governmental purpose underlying the involvement is largely secular. In addition, the freedom of even the adherents of the denomination is limited by the governmental intrusion into sacred matters. "[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." . . .

10/ 330 U.S. 60.

11/ 374 U.S. 216.

12/ 397 U.S. 664, 668 (1970).

13/ 403 U.S. 612.

14/ Aguilar v. Felton, 473 U.S. 402, 409-410 (1985).

Accordingly, Aguilar v. Felton [15] reaffirmed that

> neither the State nor the Federal Government shall promote or hinder a particular faith or faith generally through the advancement of benefits or through the excessive entanglement of church and state in the administration of those benefits.

These broadly stated principles express well-settled constitutional doctrine. Determining the precise reach of the Establishment Clause, however, is an entirely different matter.

II

Constitutional issues of a different nature were before Congress in 1933 when it first considered an unemployment compensation bill. "Scarcely anyone then believed that the national government . . . could itself establish a system of unemployment insurance, so federal legislation was sought which would induce the states to enact unemployment compensation laws." [16] The resulting statute, which became federal law in 1935, [17] is now codified as Chapter 23 of the Internal Revenue Code (the "Federal Unemployment Tax Act" or "FUTA"), [18] and Title III of the Social Security Act. [19] As Justice Blackman succinctly explained: [20]

> FUTA imposes an excise tax on "wages" paid by an "employer" in covered "employment," . . . as these terms are statutorily

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15/ 473 U.S. 414. The "benefits" mentioned in the quote consisted of the use of federal funds to send teachers and other professionals into religious schools to provide remedial instruction and other services.

16/ Edwin E. Witte, "Development of Unemployment Compensation," 55 Yale L.J. 1, 29 (1945); U.S. Const. Amd. X.

17/ 49 Stat. 639.

18/ 26 U.S.C. Section 3301 et seq.

19/ 42 U.S.C. Section 501 et seq.

20/ St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 775 fn. 3 (1980) (hereinafter "St.Martin").

> defined. . . . An employer, however, is allowed a credit of up to 90% of the federal tax for "contributions" paid to a state fund established under a federally approved state unemployment compensation law. . . . The requirements for federal approval are contained in [26 U.S.C.] Sections 3304 and 3309 . . ., and the Secretary of Labor must annually review and certify the state plan. . . . All 50 States have employment security laws implementing the federal mandatory minimum standards of coverage. A State, of course, is free to expand its coverage beyond the federal minimum without jeopardizing its federal certification.

The Secretary of Labor has outlined the major objectives of federal policy to which state programs are expected to conform. One objective is [21/]

> [t]o limit the unemployment to be compensated to that due to lack of work, by requiring claimants to be able to work and available for suitable work and by temporarily disqualifying claimants who leave work voluntarily without good cause, who are discharged for misconduct connected with their work, [or] who refuse suitable work without good cause, ...

It is also federal policy "[t]o cover so far as feasible all workers subject to the risk of involuntary unemployment." [22/]

Unemployment insurance is intended to benefit, not only claimants, but, as well, employers and the economy as a whole. The macroeconomic value of unemployment insurance lies in its role as an "automatic stabilizer" which, by providing ready cash to large numbers of people when they are out of work, tends to counter the business cycle in times of recession. [23/] Unemployment insurance aids employers directly by (for example) helping to prevent dispersal of the employer's work force during periods of temporary economic

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21/ Compilation of Materials Implementing Employment Security Programs Administered by the Department of Labor (N.Y.S. Dep't of Labor) Section O, p. 5 (1955) (hereinafter "Compilation").

22/ Id., p. 4.

23/ See, e.g., Richard E. Lester, The Economics of Unemployment Compensation (Princeton U. 1962), p. 20.

reversal, shutdown and layoff. [24] Employers who provide unemployment insurance coverage may have a competitive advantage in recruiting workers over employers who do not. Whatever the reason, a number of employers who are not subject to mandatory unemployment insurance coverage seek such coverage for their employees. This is particularly true in those situations, shortly to be discussed, where the employer can avoid part of the cost of participating in the unemployment insurance program.

FUTA allows the states some leeway with respect to funding. In New York, contributions are collected from employers in the form of a tax on the employer's payroll. [25] The rate of tax is usually determined by the employer's "experience rating," which is based on the annual cost of benefit claims charged to the employer's account. [26] Under New York law, contributions must be made entirely by employers, without any deduction from the employee's wages. [27]

If the U.S. Secretary of Labor finds that certain conditions are met, the Secretary is authorized by the Social Security Act to allocate 100% of the federal tax collected under FUTA to assist the states in the administration of their unemployment insurance programs. [28] (Administrative expenses include rents, salaries and the like, as opposed to benefit payments.) In New York, legislative approval is required before employer contributions may be used to pay administrative costs. [29]

To summarize, it is generally true in New York that unemployment insurance benefits are paid from employer contributions collected by the state, while administrative expenses are paid by the federal government from proceeds of the FUTA excise tax.

24/ Compilation, Section O, p. 4.

25/ Labor Law Section 570 (McKinney 1988).

26/ Labor Law Section 581 (McKinney 1988).

27/ Labor Law Section 570.6 (McKinney 1988).

28/ 42 U.S.C. Section 501.

29/ Labor Law Section 550.3 (McKinney 1988).

Most nonprofit organizations are exempt from the federal excise tax. [30] Internal Revenue Code Section 3301 imposes the tax "with respect to employment (as defined in Section 3306[c])." Section 3306(c)(8) excludes from the definition of employment "service performed in the employ of a religious, charitable, educational, or other organization described in Section 501(c)(3) which is exempt from income tax under Section 501(a)." Thus, Section 501(c)(3) religious organizations are not required to pay the federal excise tax which is used to finance unemployment insurance administration.

Nevertheless, since 1970, states have been required to extend unemployment insurance coverage to certain nonprofit organizations, as a condition of federal certification. [31] The next section of this article discusses, in some detail, the particular organizations subject to this rule. It should be observed, however, that the net effect of the laws just described is to shift the administrative costs of covering nonprofit organizations to other employers who are subject to the mandatory FUTA tax. [32]

In addition, it should be recalled that "[a] state . . . is free to extend its coverage beyond the federal minimum without jeopardizing its federal certification." [33] If the Secretary of Labor finds no statutory or constitutional impediment, federal funds may be used to pay the administrative costs of this extended coverage. Finally, whoever pays the administrative costs, maintenance of an unemployment insurance system is itself a valuable service provided by the government to the participants, employers and claimants alike.

III

From 1960 until 1970 FUTA excluded, from both unemployment insurance coverage and unemployment insurance taxation, all 501(c)(3)

30/ 26 U.S.C. Section 3301 et seq.

31/ Pub. L. 91-373 Section 104(b)(1), 84 Stat. 697, 26 U.S.C. Section 3309. The states are also required to permit these organizations to reimburse the fund for benefits paid, in lieu of making contributions. 26 U.S.C. Section 3309(a)(2).

32/ See St. Martin, 451 U.S. 776 fn. 6; Unempl. Ins. Rep. (CCH) Fed. Paragraph 20,271.

33/ St. Martin, 451 U.S. 775 fn. 3.

religious and charitable organizations. [34/] In 1970, however, Section 3306 was amended to require, as a condition of certification, state coverage of certain previously exempt employers, including nonprofit organizations and institutions of higher education. [35/] At the same time, Section 3309(b) was amended to exclude from required coverage three categories of employment. The excluded services were those performed:

> [Section 3309(b)(1):] in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;
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> [Section 3309(b)(2):] by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;
>
> [Section 3309(b)(3):] in the employ of a school which is not an institution of higher education. . . .

Under this definition, church-run elementary and secondary schools were exempt from coverage, as they had been exempt under the prior law. [36/]

In 1976, Section 3309(b)(3), supra, was repealed. [37/] The Secretary of Labor announced that repeal was "clearly intended to result in State coverage of church-related schools, whose employees constitute over 80 percent of the employees of all nonprofit schools." [38/] Accordingly, the state of South Dakota, in order to

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34/ Pub. L. 86-778 Section 533, 74 Stat. 984. See St. Martin, 451 U.S. 776.

35/ Pub. L. 91-373 Section 104(b)(1), 84 Stat. 697.

36/ St. Martin, 451 U.S. 777.

37/ Pub. L. 94-566 Section 114(b)(1), 90 Stat. 2670.

38/ St. Martin, 451 U.S. 778.

preserve its federal certification, extended unemployment insurance coverage to church-related schools. [39]

St. Martin Evangelical Lutheran Church ("St. Martin") and Northwestern Lutheran Academy ("Academy") commenced an administrative proceeding under state law protesting coverage. The Academy and St. Martin were each members of the Wisconsin Evangelical Lutheran Synod and, as such, were exempt from federal income taxation under Section 501(c)(3). [40] They contended, among other things, that, by rendering them liable for unemployment insurance contributions, and by providing unemployment insurance benefits to their employees, FUTA, and the corresponding provisions of state law, impermissibly established religion in South Dakota.

The facts of St. Martin Evangelical Lutheran Church v. South Dakota [41] are straightforward. [42] St. Martin operated an elementary Christian day school, certified by the state's education department, and controlled by a Board of Education elected from the local church congregation. The school was not a separate legal entity from the church. The Academy was a state-certified four-year secondary school, controlled by the synod, and not separately incorporated. Approximately half of its graduates became ministers of the church. All courses in both schools were taught from a religious viewpoint. The Supreme Court of South Dakota held that the schools were covered by the law; the U.S. Supreme Court granted certiorari review.

Justice Blackman, speaking for the court, began his analysis by observing that a statute should be construed, if "fairly possible, to avoid raising doubts of its constitutionality." [43] Acknowledging that St. Martin and the Academy were technically objecting to the coverage requirement of South Dakota law, [44] he next undertook a discussion of FUTA, with which that law was intertwined. He concluded that, after repeal of Section 3309(b)(3), services rendered to church

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39/ St. Martin, 451 U.S. 776 fn. 6.

40/ St. Martin, 451 U.S. 778.

41/ 451 U.S. 772 (1980).

42/ See St. Martin, 451 U.S. 778-779.

43/ St. Martin, 451 U.S. 780.

44/ St. Martin, 451 U.S. 780 fn. 9.

schools, such as St. Martin and the Academy, continued to be exempt from coverage under Section 3309(b)(1), supra. [45] The basis of his holding was that the schools were not corporations distinct from the church. [46] He added, by way of dictum: [47]

> Our holding today concerns only schools that have no legal identity separate from a church. To establish exemption from FUTA, a separately incorporated church school (or other organization) must satisfy the requirements of Section 3309(b)(1)(B): that the organization "is operated primarily for religious purposes," and (2) that it is "operated, supervised, controlled or principally supported by a church or convention or association of churches."

By so construing FUTA, Justice Blackman found it unnecessary to reach the Establishment Clause issue.

As Justice Stevens pointed out in his concurrence, [48] the court's interpretation of the statute must have surprised the members of Congress who effected repeal of Section 3309(b)(3), as it obviously confounded the expressed views of the Secretary of Labor. The Senate and House reports on the repeal bill stated that the purpose was to remove exemption from coverage under FUTA for all employees of private, nonprofit elementary and secondary schools. [49] Accordingly, it may be suggested that the court's disposition of the case reflected "constitutional doubts" about the extension of unemployment insurance coverage to employees of religious organizations.

Two other points raised in St. Martin merit discussion. First, the Supreme Court apparently rejected, without expressly so stating, a contention that St. Martin and the Academy were operated primarily for the purpose of "education" rather than for the purpose of "religion" within the meaning of Section 3309(b)(1)(B). [50] Secondly, the Supreme Court decisively rejected the contention that

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45/ St. Martin, 451 U.S. 784.

46/ St. Martin, 451 U.S. 782-784.

47/ St. Martin, 451 U.S. 782 fn. 12.

48/ St. Martin, 451 U.S. 788-789.

49/ St. Martin, 451 U.S. 789 fn. 1 (quoting the reports).

50/ St. Martin, 451 U.S. 779.

the term "church," as used in the conforming South Dakota statute, referred to a building or "house of worship," as opposed to a religious body or "organization of worshipers." [51] The United States, as amicus curiae, strongly urged the former construction, noting that the Department of Labor had advanced the "physical location-place of worship" theory consistently since 1970. [52] After considering the language of the statute itself, the Supreme Court wryly commented: [53]

> The amount of deference due an administrative agency's interpretation of a statute . . . "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." . . . Carefully considering the merits of the Secretary's interpretation, we believe it does not warrant deference.

The Supreme Court did not mention whether St. Martin or the Academy were, in fact, physically remote from a place of worship.

The constitutional issues left open in St. Martin were raised, but not decided, in California v. Grace Brethren Church. [54] When it reached the Supreme Court, Grace Brethren involved neither schools which were part of the corporate structure of a church (which St. Martin held to be exempt), nor separately incorporated church schools (which a dictum in St. Martin, quoted above, indicated might be exempt under certain circumstances), but a third category of schools, namely, those which are [55]

> operated primarily for religious purposes, but which [are] not operated, supervised, controlled or principally supported by a church or convention or association of churches, i.e., . . . independent, non-church affiliated religious school[s].

51/ St. Martin, 451 U.S. 779, 783.

52/ St. Martin, 451 U.S. 783 fn. 13.

53/ Id.

54/ 457 U.S. 393 (1982) (hereinafter, "GB").

55/ GB, 457 U.S. 399.

The Secretary of Labor found that coverage of these schools was required by FUTA, and the U.S. District Court agreed. The District Court concluded, however, that mandatory coverage, as a condition of certification, violated the Establishment Clause, because it would lead to excessive entanglement between government and religion in the determination of unemployment benefit claims. The District Court reasoned that coverage would involve [56]/

> state officials in the resolution of questions of religious doctrine in the course of determining the benefit eligibility of discharged employees of religious schools.

On appeal, the U.S. Supreme Court sidestepped the constitutional issue. In an opinion by Justice O'Connor, the court held that a declaratory judgment issued by the District Court, which had the effect of holding the California taxing statute unconstitutional as applied, violated the Federal Tax Injunction Act, which provides that district courts "shall not enjoin, suspend or restrain . . . the collection of any tax under State law," where an adequate remedy is available in the state courts. [57]/ The Supreme Court reached this conclusion although the District Court had not, in fact, issued an injunction prohibiting California from collecting the unemployment contributions at issue. [58]/ As Justice Stevens pointed out in dissent, to achieve this result the Supreme Court had to focus on the state law component of the unemployment insurance program whereas, in St. Martin, it had treated the coverage provisions as essentially matters of federal law. In any event, the majority in Grace Brethren justified its holding in part by stating [59]/

> Carving out a special exception for taxpayers raising first amendment claims would undermine significantly Congress' primary purpose "to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes."

Thus, for the second time in two years, the Establishment Clause issue was left undecided, while access to the district courts for

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56/ GB, 457 U.S. 402 fn. 12.

57/ GB, 457 U.S. 407, citing 28 U.S.C. Section 1341.

58/ GB, 457 U.S. 420.

59/ GB, 457 U.S. 416-417.

further consideration of the issue was substantially restricted, if not foreclosed.

The Establishment Clause arguments considered by the Grace Brethren District Court will be addressed briefly here. While Grace Brethren involved various categories of religious schools, the same issues arise from any state extension of coverage to Section 3309(b)(1) or 3309(b)(2) employment, and will be examined in that broader context. The essential point is that extension of unemployment insurance coverage to persons performing ecclesiastical services for religious organizations would not require state officials to resolve questions of religious doctrine.

Analogous problems arise when persons who work for secular institutions are fired, or quit, because some requirement of the job conflicts with a religious belief. In a series of cases discussed in Part V of this article, the Supreme Court has held that denial of unemployment insurance benefits to such persons may be prohibited, as an unconstitutional abridgement of the claimant's freedom of religion, guaranteed by the Free Exercise Clause of the First Amendment. [60/] In these cases, said the Supreme Court, the question presented for unemployment insurance determination is whether the employee's beliefs are "religious," as opposed to secular, and whether they are sincere. [61/] This factual inquiry, authorized and required by the Free Exercise cases, does not involve resolution of disputed issues of religious doctrine. If the employee performed religious duties for an ecclesiastical organization, it will be seen upon reflection that the Free Exercise considerations, and the factual approach necessary to determine benefit eligibility, would be precisely the same.

On the other hand, of course, extension of unemployment insurance coverage to services rendered to religious organizations would presumably increase the number of inquiries made by state officials into the sincerity and religious basis of claimants' behavior. Accordingly, on this ground, it may be argued that coverage would involve "excessive entanglement" between government and religion.

A second point raised by the District Court in Grace Brethren involved the contention that extension of coverage to church controlled

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60/ See Part V, infra.

61/ Frazee v. Illinois Department of Employment Security, U.S.L.W. 27462 (U.S. Dec. March 29, 1989); cp U.S. v. Seeger, 380 U.S. 163 (1965).

or affiliated schools would result in "[i]ntrusive monitoring of the activities" of employees "in order to determine whether or not those employees are exempt from unemployment insurance coverage." [62/] This problem would be particularly acute if, for example, a state covers secular employees of religious organizations while exempting those who perform religious duties for the same organization.

The answer may be that state officials generally rely upon employers to make the distinction between covered and non-covered employees. If a dispute arises (in the context of a tax assessment or benefit claim) the question will be decided in a manner comparable to that just described: the question is whether the employee performs duties of a religious nature, a factual issue unrelated to the validity of anyone's religious belief. However, the District Court's concern finds support in the observation that state officials may be more often required to examine the internal structure and practices of religious organizations.

A more fundamental Establishment Clause objection to coverage of employees of religious institutions is not expressly mentioned by the Supreme Court in Grace Brethren. The District Court was primarily concerned with the "entanglement" prong of Lemon v. Kurtzman. [63/] However, as previously noted, the Establishment Clause is intended to prohibit "sponsorship, financial support and active involvement of the government in religious activity," [64/] and is violated by laws which do not have a "secular legislative purpose" [65/] or which have the "principal or primary effect" [66/] of advancing or inhibiting religion. Extension of coverage to those who perform religious duties for ecclesiastical organizations may have this proscribed consequence and effect.

62/ GB, 457 U.S. 402 fn. 12.

63/ 403 U.S. 602.

64/ Walz v. Tax Commission, 397 U.S. 664, 668 (1970).

65/ Lemon v. Kurtzman, 403 U.S. 602, 612 (1970).

66/ Board of Education v. Allen, 392 U.S. 236, 243 (1968). Note that in Allen [392 U.S. 236, 243-244] "[n]o funds or books [were] furnished to parochial schools, and the financial benefit [inured] to parents and children, not to schools."

IV

New York has taken a "location oriented" approach to coverage of religious institutions, parallel to the position traditionally asserted by the U.S. Secretary of Labor. Thus, in 1982, Labor Law Section 563.2 excluded from the definition of employment services rendered by [67]

> (a) a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry, by a member of a religious order in the exercise of duties required by such order,
>
> (b) a lay member elected or appointed to an office within the discipline of a bona fide church and engaged in religious functions;
>
> (c) a person employed at a place of religious worship as a caretaker or for the performance of duties of a religious nature, or both, unless voluntary election has been made pursuant to [Section 561].

In 1983, following the U.S. Supreme Court's decision in St. Martin, the Appellate Division of the New York State Supreme Court, sustaining an employer's objection to an assessment of unemployment insurance contributions, held that teachers employed at a nursery school operated by Hollis Hills Jewish Center were "persons employed at a place of religious worship . . . for the performance of duties of a religious nature" under Section 563.2(c) and, accordingly, were not covered by the unemployment insurance law. [68] The court's opinion did not specify whether the nursery school was separately incorporated or physically remote from a synagogue. [69] Although the New York Commissioner of Labor made the assessment at issue in Matter of Hollis Hills Jewish Center v. Roberts, [70] during the

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67/ McKinney 1988.

68/ Matter of Hollis Hills Jewish Center v. Roberts, 92 A.D.2d 1039 (Third Dept. 1983).

69/ However, the Unemployment Insurance Appeal Board found that "the facility . . . consists of a main and smaller sanctuary, and classrooms used for various activities, inluding the nursery school" (Appeal No. 334,336A).

70/ 92 A.D.2d 1039.

course of the litigation the Commissioner acquiesced to a judicial finding that the Hollis Hills teachers were not covered. The New York legislature, however, disagreed. Its response to Hollis Hills was ingenious, if somewhat defiant.

Section 561 of the New York Labor Law permits employers who are not subject to mandatory coverage under FUTA to voluntarily elect coverage. After Hollis Hills was decided, New York amended Section 563.2(c), supra, by adding the words "unless voluntary election has been made pursuant to the provisions of [Section 561]," [71] and adding a new provision, Section 561(c), permitting voluntary election as follows: [72]

> (c) Services performed at a place of religious worship. The services of a person performed at a place of religious worship as a caretaker or for the performance of duties of a religious nature, or both, shall be deemed employment within the meaning of this article, if his employer makes application to this effect and the commissioner approves such application in writing.

The Labor Department memorandum in support of the amendment states: [73]

> Section 563.2(c) of the Labor Law was originally written to exclude from unemployment insurance coverage those individuals who were actively engaged in the performance of duties that were of a religious nature. In Matter of Hollis Hills Jewish Center, . . . the scope of this section of the law was extended and it was held that nursery school teachers employed at a place of religious worship were performing duties of a religious nature. Under this decision, all teachers who perform services for religious schools, even those who teach only secular subjects, are excluded from UI coverage if the school is located at a place of religious worship. The effect of this decision is to treat such teachers in a dissimilar manner from those who are performing precisely the same teaching services for religious organizations which operate

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71/ L. 1986 Ch. 330 Section 2.

72/ L. 1986 Ch. 330 Section 1.

73/ 1986 McKinney's Session Laws of New York 2904.

their schools separate and apart from their place of worship.

Thus, the Labor Department memorandum continues, the amendment [74]

permit[s] an employer to elect to cover the services rendered for a nonprofit organization by a person employed at a place of religious worship as a caretaker or for the performance of duties of a religious nature, which are presently excluded from unemployment insurance coverage.

Who could object to such voluntary coverage? Not the employer, who must elect coverage. Not the Commissioner of Labor, who must consent to the election. Not the employees who are to be covered by the unemployment insurance program. Perhaps not even the present writer, although qualms about the issue provided the incentive for this article. The U.S. Supreme Court has warned against "too sweeping utterances on aspects of the [Religion Clauses] that seemed clear in relation to the particular cases but have limited meaning as general principles." [75] Yet, the question remains whether a primary or principal effect of the New York law is the advancement of religion. Does the statute (including the provisions which shift administrative costs to profit-making employers) impermissibly finance, sponsor or support religion? [76] The reader may answer these unsettled questions based upon his or her own perception of the controlling law. The case will not be argued here. However, this writer agrees with Elihu Root, who, in 1894, while urging the adoption of an amendment to the New York constitution prohibiting the use of public funds for sectarian education stated [77] "it is not a question of religion or creed or party; it is a question of declaring and maintaining the

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74/ Id.

75/ Walz v. Tax Commission, 397 U.S. 664, 668 (1970).

76/ An even more compelling question, far outside the scope of this article, is whether the provisions of federal law which permit religious orders, whose members are required to take a vow of poverty, the option of electing coverage under the Social Security old age, survivors and disability insurance system. See Unemployment Ins. Rep. (CCH) Fed. Paragraph 10,466C.

77/ Root, Address on Government and Citizenship, 137, 140, quoted in Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 219 (1947) (opinion of Frankfurter, J.).

great American principle of eternal separation between church and state."

For more than two hundred years prior to the adoption of the First Amendment Europe was wracked with periodic warfare, and religious persecution, associated with the commingling of religion and politics. The Founding Fathers were thus well aware of the potential for violence inherent in state sponsorship of religion. Today, many Americans may be more concerned with promoting religious liberty abroad, and protecting it at home, than with questions of religious establishment. And yet, we should remind ourselves that the establishment of religion by government tends to breed religious intolerance, and the consequent loss of religious liberty. The example provided by those nations which vest political authority in religious zealots demonstrates that the evil which the framers of the First Amendment sought to avoid still exists in the modern world.

By itself, unemployment insurance coverage of religious institutions, like the Virginia Assessment Bill of 1784, may be of little significance. However, as Madison said: 78/

> Because it is proper to take alarm at the first experiment on our liberties . . . the freemen of America did not wait till usurped power had strengthened itself by exercise and entangled the question in precedents. They saw all of the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much, soon to forget it.

V

Adell Sherbert, a member of the Seventh Day Adventist Church, was dismissed from her employment because she would not work on Saturday, the Sabbath day of her faith. Unable to find other work because of her Sabbatarian principles, she applied for unemployment insurance benefits, which benefits were refused under provisions of a South Carolina statute which required that claimants be able and available for work, and that they accept offers of suitable employment. Upholding the denial of benefits, the South Carolina Supreme Court rejected her contention that the statute, as applied, abridged Ms. Sherbert's First and Fourteenth Amendment right to the free

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78/ II Madison 183, 185-186, quoted in Everson, 330 U.S. 1, 40 fn. 29 (Rutledge, J. dissenting).

exercise of her religion. The state Supreme Court held that the statute "places no restriction upon [Ms. Sherbert's] freedom of religion nor does it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dictates of her conscience." [79] The U.S. Supreme Court reversed. [80]

The U.S. Supreme Court's opinion, written by Justice Brennan[8] begins with an outline of the controlling constitutional principles:

> The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such . . . [emph. in orig.]. Government may neither compel affirmation of a repugnant belief, . . .; nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, . . .; nor employ the taxing power to inhibit the dissemination of particular religious views. . . .

On the other hand, the court noted, its precedents allow governmental regulation of conduct having religious significance for the actor, if the conduct poses some substantial threat to public safety, peace or order. [82] Since Ms. Sherbert's conscientious objection to Saturday work involved no such threat, the court reasoned the denial of benefits could withstand constitutional scrutiny only if it did not infringe her right to the free exercise of religion, or if any incidental burden imposed upon such right could be justified by a compelling state interest in some matter which the state had constitutional power to regulate. [83]

The Supreme Court concluded that the denial of benefits to Ms. Sherbert "clearly" imposed a burden on the free exercise of her

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79/ Sherbert v. Verner, 374 U.S. 398, 401 (1963) (hereinafter "Sherbert").

80/ Sherbert, id.

81/ Sherbert, 374 U.S. 402.

82/ Sherbert, 374 U.S. 403.

83/ Id.

religion, because it required her to forego one of her religious precepts in order to qualify for benefits: [84]

> [i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.

The court then held that South Carolina's expressed desire to avoid unemployment insurance fraud did not satisfy the "compelling state interest" test, which could only be met, in this sensitive constitutional area, by proof of "the gravest abuses, endangering paramount interests." [85] South Carolina's fear of depleting the unemployment insurance fund, or of malingering employees, even if compelling, would not satisfy the test, said the court, unless the state could demonstrate that no "alternative form of regulation would combat such abuses without infringing First Amendment rights." [86]

The court distinguished, with some difficulty, the Sunday closing law case, [87] in which it found that the compelling interest test was satisfied by a state's interest in a "uniform day of rest," a factor not present in Sherbert, and observed that Ms. Sherbert's Saturday observance does not "serve to make [her] a nonproductive member of society." [88] The court's opinion in Sherbert v. Verner concluded: [89]

> Our holding today is only that South Carolina may not constitutionally apply the eligibility provisions [of its unemployment insurance law] so as to constrain a worker to abandon his religious convictions respecting the day of rest.

84/ Sherbert, 374 U.S. 398, 404, quoting Braunfeld v. Brown, 366 U.S. 599, 607.

85/ Sherbert, 374 U.S. 406, quoting Thomas v. Collins, 323 U.S. 516, 530.

86/ Sherbert, 374 U.S. 398, 407.

87/ Braunfeld v. Brown, 366 U.S. 599.

88/ Sherbert, 374 U.S. 410.

89/ Id.

Asserting that "we are not fostering the 'establishment' of the Seventh Day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshipers reflects nothing more than the governmental obligation of neutrality in the face of religious differences," [90] and does not require excessive entanglement between government and religion (conclusions which Justice Stewart, concurring in result, vigorously disputed as inconsistent with the Establishment Clause Cases), [91] the Supreme Court reversed and remanded. Justices Harlan and White dissented in Sherbert, [92] arguing primarily that Ms. Sherbert's unavailability for work, rather than the reason for such unavailability, was the relevant consideration.

In Indiana, a claimant who leaves his job voluntarily is disqualified from receiving unemployment insurance benefits unless his unemployment resulted from "good cause [arising] in connection with his work." [93] Eddie Thomas was employed in a roll foundry, manufacturing sheet metal. When the foundry closed, he was transferred to another plant, which manufactured turrets for military tanks. Thomas concluded that the work conflicted with the pacifist tenets of his religion. Since no other work was available, he quit "due to his religious convictions." [94] The Supreme Court of Indiana held that he was disqualified from benefits; the U.S. Supreme Court, applying Sherbert, reversed. [95]

In so doing, Chief Justice Burger, speaking for the court, discussed the religious beliefs protected by the First Amendment. He observed that interfaith differences among followers of a particular creed (here, whether the precepts of the Jehovah's Witnesses permit or prohibit the manufacture of arms) are not uncommon, and it is not for courts to resolve these doctrinal questions. [96] He noted that

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90/ Sherbert, 374 U.S. 409.

91/ Sherbert, 374 U.S. 413 fl.

92/ Sherbert, 374 U.S. 418 fl.

93/ Thomas v. Board of Review, 450 U.S. 707, 101 S.Ct. 1425, 1429 (1981) (hereinafter "Thomas").

94/ Id.

95/ Id.

96/ Thomas, 101 S.Ct. 1431.

"religious beliefs need not be acceptable, logical, consistent, or comprehensible to others" to merit First Amendment protection,[97] and that "[c]ourts should not undertake to dissect religious beliefs because the believer admits he is 'struggling' with his position. . . ."[98] The Supreme Court would return to these issues in the later case of Frazee v. Department of Employment Security, infra.

Thomas v. Board of Review reaffirmed the "burden on religion" test adopted in Sherbert. The Thomas court said:[99]

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

With respect to the state interest necessary to justify a burden on the free exercise of religion, the Thomas court adopted language from another line of cases and declared:[100]

> The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest.

The court noted, however, that "only those interests of the highest order can overbalance legitimate claims to the free exercise of religion."[101]

Several terms later, in Hobbie v. Unemployment Appeals Commission,[102] the Supreme Court applied the principle of Sherbert

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97/ Thomas, 101 S.Ct. 1430.

98/ Id.

99/ Thomas, 101 S.Ct. 1432.

100/ Id.

101/ Thomas, 101 S.Ct. 1432, quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

102/ 107 S.Ct. 1046 (1987).

and Thomas to a religious convert, whose objections to employment arose, not from any change in her job, but from her adoption of a new faith (After working in a jewelry store for 2 1/2 years, Paula Hobbie informed her employer that she was to be baptized into the Seventh Day Adventist Church and that, for religious reasons, she would no longer be available to work on Saturdays. The denial of unemployment insurance benefits which followed was reversed by the U.S. Supreme Court.). The Hobbie court said: [103]

> Both Sherbert and Thomas held that such infringements [i.e., the indirect burden upon free exercise of religion resulting from the denial of unemployment insurance benefits] must be subjected to strict scrutiny and could be justified only by proof by the State of a compelling interest.

The U.S. Supreme Court thereupon declined to relax the "strict scrutiny-compelling state interest" test or otherwise to modify or distinguish Sherbert v. Verner.

Most recently, in Frazee v. Department of Employment Security, [104] the state of Illinois rejected the unemployment insurance claim of an unaffiliated "Christian" who refused to accept a temporary job working on Sundays. Noting that not every Christian sect prohibits Sunday labor, the state court adopted a rule authorizing the denial of benefits unless the refusal to work is based upon the tenets or dogma of some church, sect or denomination to which the claimant belonged. Relying upon its holding in Thomas v. Board of Review (that disputed or unsettled dogma qualifies for First Amendment protection) a unanimous Supreme Court reversed.

In so doing, the court found two elements necessary for invocation of the Free Exercise Clause. The first requirement is that the refusal to work be based upon religious, rather than secular considerations. The court recognized that some beliefs may be "so bizarre, so clearly nonreligious in motivation" [105] as not to qualify for Free Exercise protection, but found that Frazee's refusal, as a Christian, to work on Sunday was religious, and was acknowledged by Illinois to be such.

103/ 107 S.Ct. 1046, 1049.

104/ U.S.L.W. 27462 (U.S. Dec. March 29, 1989).

105/ Frazee v. Department of Employment Security, id., fn. 2, quoting Thomas, 450 U.S. 707, 715.

The second element authorized by the Supreme Court is a requirement that the claimant's religious belief be sincerely held Frazee's sincerity was conceded by Illinois). With respect to the sincerity test, the Supreme Court cited U.S. v. Seeger, [106] which interpreted a federal statute as granting an exemption from compulsory military service to conscientious objectors whose religious views were personally evolved, and unique to themselves, rather than having been promulgated by an organized religion. In that case, the Supreme Court observed that it was proper for administrative agencies to examine the sincerity, but not the truth or validity, of an individual's professed religious belief.

As it had in prior cases, the Supreme Court in Frazee found a lack of evidence that granting unemployment insurance benefits to Sunday worshipers would create widespread unemployment, or even seriously affect unemployment. Accordingly, it found that the "compelling state interest test" had not been met, and reversed the judgment of the Illinois court.

Thomas v. Board of Review involved religious objection to a particular type of work (armament production), while the other cases discussed in this section all concerned Sabbath observance. Other forms of religious expression in the workplace (the wearing of religious garb or emblems, proselytizing coworkers or customers, etc.) have not been addressed by the Supreme Court in the context of unemployment insurance, and, accordingly, are beyond the scope of this survey. It will be noted that the four unemployment insurance cases invoking the Free Exercise Clause all involved denial of benefits (discharge, quitting, availability for work and refusal of employment). By contrast, the Establishment Clause, with which this article is principally concerned, is usually invoked in the context of unemployment insurance coverage. Finally, while the Supreme Court has recognized a "tension" between the Free Exercise and Establishment Clauses as presently construed, [107] resolution of that tension will not be attempted here.

106/ 380 U.S. 163 (1965).

107/ Rehnquest, J., dissenting in Thomas, 101 S.Ct. 1433; See also Vander Laan v. Mulder, 443 N.W.2d 491 (Mich. App. 1989).

ABOUT NAALJ

For those who have recently joined NAALJ, or who may be thinking of joining, we include this brief description of our association.

The National Association of Administrative Law Judges, formerly known as the National Association of Administrative Hearing Officers (NAAHO), is a non-profit, professional organization dedicated to the improvement of the administrative hearing process. It is comprised of state, federal, county and municipal administrative law judges, hearing officers, referees, trial examiners and commissioners, and members of higher appellate authorities, exercising a wide variety of subject matter jurisdiction.

NAALJ was established in 1974; it now has members in every state, Canada, the Virgin Islands and Puerto Rico. The New York State Administrative Law Judges Association, the California Administrative Law Judges Association and the Illinois Association of Adminstrative Law Judges are among its largest affiliated local chapters.

NAALJ strives to enhance the quality of administrative justice, and to improve the process of dispute resolution. It serves as a forum for the exchange of ideas and information, conducts periodic seminars and training conferences, publishes a journal, and confers with officials of the state and federal governments on methods of improving administrative adjudication. The National Administrative Law Foundation, incorporated by NAALJ in 1980, is expressly devoted to the public interest.

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KANSAS CITY WELCOMES NAALJ

OCTOBER 17-20, 1990

Convention headquarters for the 1990 NAALJ Convention and Seminar is the Plaza Hilton Hotel located in the beautiful plaza area of Kansas City, Missouri. Members from Missouri (home of Frank Wallemann, Convention Chairman), Kansas (home of the NAALJ 1989-90 President Barbara Lundin Kovarovic) and Iowa are combining efforts to make the convention and seminar the best ever. In addition to being an academically strong meeting, the location promises broad opportunities for cultural enrichment.

The Kansas City Area, centering on Missouri's western metropolis and Kansas' eastern metropolis, is ideal for vacationers who don't like to spend a lot of time going from one attraction to the next. In this compact area, travelers enjoy history, urban fun and scenery.

First time visitors often are surprised by Kansas City's beauty. Rolling hills, tree-lined boulevards, parks and fountains provide a visual treat.

Swope Park highlights the city's "green space". Since 1896, visitors have enjoyed what ranks as one of America's largest urban parks (more that 1,700 acres). You'll enjoy the zoo, nature trails and golf courses -- including what may be Missouri's only Frisbee golf (folf) course.

In all, the metro area offers 25 lakes in parks of all sizes. There's a lake and rose garden at 75-acre Loose Park. And 970-acre Lake Jacomo, in Fleming Park, is an area favorite. The 4,000-acre park also features preserved historic buildings in Missouri Town 1855.

The city is virtually ringed with lakes -- for example, Smithville Lake on the north. And two new lakes, Longview and Blue Springs, are on the south and east.

For many travelers, a big city means shopping, dining and nightlife. If that's your pleasure, you'll love Kansas City and Overland Park. For starters, there's historic Westport. Buildings fromm the city's early days have been transformed into boutiques, restaurants and nightspots.

Nearby is the famed County Club Plaza -- 14 square blocks, developed in the 1920s as America's first shopping center. The elegant area offers fountains and Moorish architecture, along with more that 150 shops and 30 restaurants.

Want more? There's 85-acre Crown Center, virtually a city

within a city. Or the new AT&T Town Pavilion, downtown. There's th colorful City Market, dating to the 1840s. And there are regiona shopping malls throughout the metro area.

Perhaps history and museums are what you expect when you visit major city. If so, stop by the 216-foot Liberty Memorial (it' practically across the street from Crown Center). You can ride t the top or tour the Memorial's World War I museum.

The city's premier museum, of course, is the Nelson-Atkin Museum -- one of America's top art museums. Also, don't miss th Kansas City Museum, the Miniature Museum or the pre-Civil War Wornal House, among other museum experiences.

If pro sports action makes you cheer, come see the baseball Royals and football Chiefs at the Truman Sports Complex. At Kemper Arena, you'll get a kick out the the Comets, the city's entry in the Major Indoor Soccer League.

When you are luckey enough to be there in the summer months, then head for Worlds of Fun. You'll enjoy more than 115 rides and shows at the family fun park. And you can cool off at nearby Oceans of Fun -- the Midwest's largest tropically-themed water park.

But wait... there's more! There's music, from jazz to the Symphony to the Lyric Opera. There's Old West fun and horseback riding at Benjamin Stables. There are dinner theaters (Tiffany's Attic, Waldo Astoria), river excursions (on the Missouri River Queen), and a year full of concerts and festivals.

And there are side trips. Don't forget that the Kansas City Area is much more than just Kansas City.

North along the Missouri River is Weston, with more than 100 buildings pre-dating the Civil War. Visit the Weston Historical Museum or tour the family-run McCormick Distillery. When the snow flies, try skiing at Snow Creek.

Kansas City's best-known suburb is Missouri's fourth-largest city, Independence. Once a major stop on the old frontier trails, it's more famed today as the home of Harry Truman. Visit the Truman Library and Museum, with fascinating exhibits on the presidency. Go by Mr. Truman's home and his restored office at the county courthouse (you'll want a photo of the Truman statue outside).

For a look at earlier history, walk through the 1859 Jail, Marshal's Home and Museum. Or stop by the Mormon Visitors Center to learn why Independence holds special significance for their church. And at the auditorium, world headquarterrs of the Reorganized Church of Jesus Christ of Latter Day Saints, you'll see a museum and gallery.

Travel north to Liberty to visit the jail where Mormon prophet Joseph Smith was confined in 1838-39. Also here is the Jesse James Bank Museum, site of America's first daylight bank robbery. And at Kearney, you can see the home where Jesse James grew up (and his gravesite).

Nearby is Excelsior Springs, once a world-famed health spa. You can sample the mineral water or tour the city's historical museum. And just north, the Watkins Mill State Historic Site has preserved an 1860s woolen mill.

Head east from Kansas City for a look at Fort Osage, reconstructed on the Missouri River, where William Clark built America's first outpost in the Louisiana Territory. Farther east is Lexington, site of a major Civil War battle. You'll enjoy the town's historical museum and browsing through its antique shops.

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NOTES